NO. 863.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE CENTRAL TRUST COMPANY, OF NEW YORK, (A CORPORATION) AND THE HELENA POWER AND LIGHT COMPANY (A CORPORATION),

Appellants.

VS.

JOHN W. WARREN,

Appellee.

BRIEF OF APPELLEE.

T. J. WALSH,

Counsel for Appellee.

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BRIEF OF APPELLEE.

I. MOTION TO DISMISS.

1. The appellee has moved to dismiss the appeal herein upon the ground that it is taken from a part of the decree only, and this court has no jurisdiction to review by appeal a part of a judgment or decree, and because the decree from which the appeal is taken in part has already been enforced and executed.

The act of Congress conferring its jurisdiction upon this court authorizes it to review by appeal any final decisions of

the circuit courts. In order to invoke the jurisdiction of this court, the entire decree must be brought before it by the appeal. There is no such thing as an appeal from a part of a final decree or judgment unless power to do so is expressly conferred by statute. It has been so determined by the Supreme Court of the United States, as well as by the Supreme Court of the Territory of Montana.

In Canter vs. Am. Ins. Co., 3 Peters, 316,

Mr. Justice Story says:

"It is of great importance to the due administration of justice, and is in furtherance of the manifest intention of the legislature, in giving appellate jurisdiction to this court upon final decrees only, that causes should not come up here in fragments upon successive appeal. It would occasion very great delays and oppressive expenses."

The proposition was directly determined in the case of

Barkley vs. Logan, 2 Mont., 296,

the ruling being expressed in the syllabus as follows:

"An appeal from only a portion of the decree or final judgment is not authorized by statute and cannot be entertained."

In the body of the opinion the Court says:

"When an appeal is taken from a judgment, it must be taken from the whole of it. The statute does not authorize the taking of a judgment into an appellate court for review by piecemeal. The appeal must bring the whole judgment before the appellate court. This court cannot reverse or affirm the fragment of a judgment. Jurisdiction for this purpose has not been conferred. * * * We hold that this court, under the statute, has no jurisdiction to hear an appeal from a part of a final judgment, unless the whole judgment is before it. The whole judgment must be appealed from to give this court jurisdiction over any particular portion."

In support of the conclusion so pointedly expressed, the

learned Chief Justice refers to the remarks of Mr. Justice Story in Canter vs. American Insurance Company, above quoted. The decision in this case was affirmed in the case of

Plaisted vs. Nowlan, 2 Mont., 359,

and has never been departed from. The proposition was also directly adjudicated in the case of

Wright vs. Western Union Tel. Co., 4 Oh. C. C. 375.

The statute of the state of California, by evident implication, permits an appeal to be taken from a part of a judgment. The jurisdiction could not be supported by a grant of authority simply to review final judgments.

Hayne on New Trial and Appeal, Sec. 185.

The law does not favor the decision of controversies piecemeal.

Elliott on Appellate Proc., 91.

The Helena Power and Light Company appeals from this part of the judgment, as well as does the Central Trust Company. If the Helena Power and Light Company has the right to appeal from this part of the decree, it also has the right to appeal from that part of the decree awarding a deficiency judgment against it, in case the mortgaged property shall be insufficient to pay the indebtenness. It might also appeal from that part of the judgment directing a sale of its property, and on such appeal urge that it had no statutory or other authority to execute the mortgage, or that it was invalid for any other reason. In other words, if it be conceded that an appeal can be taken from a part of a judgment, the number of different appeals which might be taken in this case by the Helena Power and Light Company would be limited only by

the number of separate propositions involved in the decree.

It appears that the Central Trust Company obtained substantially all the relief asked for by them, but the court might have reached the conclusion that it was not entitled to a deficiency judgment, and, had a decree been entered to that effect, the Central Trust Company would have as good a right to prosecute a separate appeal from that part of the judgment as it has from that part from which it has appealed. By an appeal in a suit in equity, the whole case is removed into the court above for trial *de novo*.

"There is no decree left in the lower court, and, pending the hearing on appeal, there is no decree in the case."

Sharon vs. Hill, 26 Fed. 337-345;

Yeaton vs. United States, 5 Cranch, 281.

In view of the nature of an appeal in equity as expressed in the case of Sharon vs. Hill, *supra*, it is evident that there can be no such thing as an appeal from a part of the decree.

2. The decree from a part of which this appeal is prosecuted has already been enforced, as shown by the certified copies of the notice of sale, report of master and order confirming sale, filed with this motion. It is settled beyond question that a party cannot at one and the same time enforce a judgment obtained by him and at the same time prosecute an appeal for its reversal.

Albright vs. Oyster, 60 Fed. 644.

In this case the Circuit Court of Appeals for the Eighth Circuit said:

"No rule is better settled than that a litigant who accepts the benefits, or any substantial part of the benefits of a judgment or decree is thereby estopped from reviewing and escap-

ing from its burdens. He cannot avail himself of its advantages, and then question its disadvantages in a higher court."

Knapp vs. Brown, 45 N. Y. 207;

Laird vs. Giffin, 54 N. W. 584 (Wis.);

Portland Const. Co. vs. O'Neill, 32 Pac. 764 (Or.).

3. If the appeal could be sustained, notwithstanding the objections above urged, the appellants have no right to unite in an appeal. Each may have a separate right of appeal, that is, each might be entitled to obtain a separate order of appeal and give a separate bond on appeal, but they have no right to unite in an appeal, as they have no joint interests.

II. ON THE MERITS.

The mortgagee, the Central Trust Company, and the mortgagor, the Helena Power and Light Company, have prosecuted a joint appeal, given a single bond, united in the assignment of errors, and filed a joint brief. The assignment of errors is an essential part of the record on appeal, as well as upon the writ of error. It is a rule, perhaps universally declared in those jurisdictions requiring the assignment of errors, that if an assignment is made by parties jointly, it must be overruled unless the assignment can be sustained as to all the parties joining in the assignment,

Tretheway vs. Peek, 62 N. E. 59;

Curtis vs. D. M. Osborne & Co., 89 N. W. 420;

Woodruff vs. Smith, 31 So. 491.

See generally 3 Century Digest, 819.

It follows from this that if any one of the parties who joins in the assignment of error is in such a position that the assignment cannot be sustained as to him, it must be overruled as to all.

Curtis vs. Osborne, *supra;*

Moseman vs. State, 81 N. W. 853.

The error complained of in this decree is one that in no manner concerns the Helena Power and Light Company. From the allegations of the bill it appears that it is utterly insolvent and that the mortgaged property is insufficient to satisfy the claim of the complainant. Whether out of the avails of the mortgaged property the complainant shall be first paid, or the appellee, is a matter of absolute and utter indifference to it. Had it taken a separate appeal from the decree in this case and urged nothing further than that the decree was erroneous in awarding the appellee a priority over the complainant, the court would properly have affirmed the decree without inquiring into the merits of the contention, upon the ground that its interests were in no manner affected by that provision of the decree. If any complaint of that character was to be made, it should manifestly come from the complainant, and not from the Helena Power and Light Company. So manifestly immaterial to the Helena Power and Light Company is this portion of the decree that the Central Trust Company, prior to the taking of this appeal, prosecuted another appeal from this decree, altogether omitting the Helena Power and Light Company from the record. This appeal appears still to be pending in this court, but is apparently abandoned by the appellant therein, the Central Trust Company.

But there is another rule that forbids the consideration by the court of the error assigned. Parties are not entitled to join in an assignment of error unless they join in the excep-

tion upon which the assignment is founded.

Davis vs. Seybold, 61 N. E. 743;

Smith vs. Am. C. M. Co., 62 N. E. 1013.

The Helena Power and Light Company has manifestly no right to come to this court complaining of a decree in which it fully acquiesced in the court below. It took no exception whatever to the order below denying the application of the complainant for a decree as prayed in its bill of complaint. It was not even present, and was not heard on the presentation of this question in the court below. If it had any interest in the question it certainly did not assert it there, and it appears with little grace before this court complaining of an alleged error on which it was altogether silent in the lower court. The defendant did not answer at all below, and the decree was taken against it *pro confesso.*

Transcript, page 53.

The motion of the Central Trust Company, the denial of which by the Circuit Court is made the basis of complaint here, was not served upon the defendant, Helena Power and Light Company, or any one representing it, and it does not appear from the record that it was present at the hearing. There was, therefore, no joint application to the court below by the defendant, Helena Power and Light Company, and the complainant, Central Trust Company, for judgment in favor of the Central Trust Company, as prayed in its bill of complaint, and there could not well be. They have, therefore, no joint right to except or complain of the rule of the court upon the motion, and their joint assignment of error being bad, accordingly, as to the Helena Power and Light

Company, is bad as to both of the appellants.

It is to be regretted that the brief of appellants should have ventured to say to the court what were the views of the lower court touching the question involved, when no written opinion was filed. Such a course is almost certain to invite contradiction, and, in this instance, demands it. The writer was not present at the time the ruling complained of was made, but on a later day the counsel for the appellant, Central Trust Company, who was apparently not in court either, addressed a remark of inquiry to the court and was told by the judge that he ~~had held that he~~ had not considered the question of the applicability of the constitutional provision relied upon by appellee, because in his judgment there was no statute of the State of Montana under which a street railway company could be organized, except that providing for the incorporation of railroad companies, under which act, if the mortgagor or defendant were incorporated under it, appellee's judgment would be entitled to priority over complainant's mortgage. In other words, the court said he had not determined whether Section 17 of Article XV of the Constitution of Montana did or did not give the appellee's judgment priority.

The appellee concedes that if there were no other statute under which the incorporation of street railway corporations in Montana could be justified, authority might be found in Section 446 of the Compiled Statutes, under which ~~appellee~~ appellants claim~~s~~ it must be considered to have come into existence, which section is as follows:

"Sec. 446. At any time hereafter any three or more per-

sons who may desire to form a company for the purpose of carrying on any kind of manufacturing, mining, mechanical or chemical business; of digging ditches, of building flumes or running tunnels, of purchasing, holding, developing, improving, using, leasing, selling, conveying or otherwise disposing of water powers and the sites thereof, and lands necessary or useful therefor, or for the industries and habitations arising or growing up, or to arise or grow up, in connection with or about the same; of purchasing, holding, laying out, platting, developing, leasing, selling, dealing in, conveying, or otherwise using or disposing of townsites, or towns, or the lots, blocks, or subdivisions thereof, or lots, blocks, or subdivisions in any town, village or city, or of carrying on any other branch of business designed to aid in the industrial or productive interests of the country and the development thereof, or of one or more of the aforesaid branches of business." * *

The word "industrial," used in this statute, is doubtless broad enough in its significance to include a street railway company if it includes an express company, as was decided in

Wells Fargo & Co. vs. Railway Co., 23 Fed. 469,

a mercantile business as was held in

Carver Merc. Co. vs. Hulme, 7 Mont. 566.

and in

Bushford vs. Agna Fria Co., 35 Pac., 983

But by the same course of reasoning the incorporation of an ordinary railroad company could be justified under this section. If the language is broad enough to include a street railway company, it is broad enough to include the ordinary steam railroad company. It cannot be contended that the business of the former is "designed to aid in the industrial interests of the country" and that that of the latter is not. Indeed, if the matter permitted of doubt, it could be confidently asserted that whatever doubt existed would be resolved in favor of the steam railroad company.

Yet no one will contend, inasmuch as there is a special statute providing for the incorporation of railroad companies, that such companies are embraced within those referred to in Section 446, or that a railroad company could be organized in the manner prescribed in that section and others of the same chapter.

Railroad corporations are organized under the provisions of Chapter XXXV of the 5th Division General Laws of Montana (or before July 1, 1895, when the codes were adopted). One of the sections of this chapter, Section 707, provides that—

"Sec. 707. A judgment against any railway corporation for any injury to person or property, or for material furnished or work or labor done upon any of the property of such corporation, shall be a lien within the county where recovered on the property of such corporation, and such lien shall be prior and superior to the lien of any mortgage or trust deed provided for in this act."

It is not a question as to whether the incorporation of street railway companies may be justified under a statute providing for the incorporation of industrial companies, but when there are two statutes, one for the incorporation of industrial companies and the other railroad companies, a street railway company is to be deemed incorporated under the former or under the latter.

No such question was presented in the case of Massachusetts Loan and Trust Co. vs. Hamilton, as in that case the mortgagor company was a corporation created under the laws of the State of New Jersey.

Undeniably if the defendant company is to be deemed incorporated under the provisions of Chapter XXXV, its

mortgage would be subject to the provisions of Section 707.

Although, as stated, the word "industrial" as applied to corporations might, under certain circumstances, be deemed to include street railways, it must be conceded that the term is not apt and that a most liberal construction must be indulged in order to embrace such corporations. The term "industrials" is in very common use to designate certain classes of stocks traded in on exchanges, but no one ever thought of applying the term to the shares in a street railway or in an ordinary steam railroad company. If one were asked as to what the industries of a city or state are, it would be a queer answer to say, "railroads and street railways," or to include them in any list of industries.

We submit, therefore, that when the record is altogether silent as to whether the defendant company was incorporated under the provisions of Chapter XXXV concerning "Railroad Corporations," or Chapter XXV relating to "Corporations for Industry or Productive Purposes," it cannot be deemed to owe its origin to the latter rather than to the former.

Whatever distinction once existed between street railways, so-called, and other railways, is fast passing away. With the application of electricity to the purpose of locomotion, systems formerly known as street railways traverse many miles of open country. This defendant company for several years, by way of illustration, operated its line between Helena and East Helena, six miles distant. There is no doubt that under the federal statute it would have been entitled to a right of way over any intervening portion of the public domain. Freight of all kinds is now being transported in the same way. When

electricity supplants steam as the motive power of the so-called "railroads of commerce," every vestige of distinction will have gone. It can not be considered that the defendant company must necessarily have been incorporated under the provisions of Chapter XXV.

3. But we most respectfully insist that the decree is right by reason of Section 17 of Article XV of the Constitution of Montana, as follows:

> "Sec. 17. The legislative assembly shall not pass any law permitting the casing or alienation of any franchise so as to release or relieve the franchise or property held thereunder from any of the liabilities of the lessor or grantor, or lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise or any of its privileges."

It appears to be contended by the appellants that the defendant company did not alien any "franchise," nor use, operate or enjoy any "franchise," its rights being something of a different character, denominated in the brief a "license." (Page 21.)

The bill of complaint alleges the execution of a mortgage upon "franchises" held by the defendant company,

Transcript, page 5,

and asks that a receiver be appointed to take possession of the "franchises" of the defendant, together with the other property.

Transcript, page 11.

The mortgage made by it purports to mortgage its "franchises,"

Transcript, page 17,

and particularly designates that "certain railway and *franchise* situated in said city of Helena, etc.,"

Transcript, page 22,

and, lest the description should not be sufficiently definite, it is said, at page 25, that "it is the intention hereby to convey all property of every kind and character owned by the grantor, * * whether situated within or withont the corporate limits of said city of Helena, together with all and singular the *franchises*, grants, rights, easements and privileges now owned and enjoyed by the said grantor." The decree finds that the franchises were mortgaged.

Transcript, page 60.

So far as the defendant company could do so it undoubtedly mortgaged its franchises by this mortgage, and the complainant so represents the facts to the court.

Numerous definitions of the word "franchise" are collected by Professor Thompson,

4 Thompson's Commentaries, 5335,

including that of Chancellor Kent, to the effect that "franchises are privileges conferred by grants from the government and vested in private individuals." And, from another source, "the right or privilege of being a corporation and of doing such things and such things only as are authorized by the corporation's charter." In the same connection he speaks of the "franchise of laying a railroad in the streets of a city," and, continuing with reference to franchises of this charrcter, he says, "while these municipal grants are often termed licenses on the theory that a municipal corporation cannot grant a franchise, and can only grant a license, yet they are franchises in every essential particular, as much as though

they had been granted directly by the legislature." The Supreme Court of the Udited States defined the term in

Bank of Angusta vs. Earle, 13 Peters, 519,

as "special privileges conferred by government upon individuals, and which do not belong to the citizens of the country generally by common right."

The right to lay down a railway and operate it in the streets of a city is a privilege not enjoyed by citizens generally by common right. An ordinary citizen, not having municipal authority for it, would find himself guilty of a nuisance if he attempted to operate a street railway. Citing this definition, it was held in

Detroit vs. Detroit Railway, 56 Fed. 882,

that the privilege of constructing and operating a street railway is a "franchise." So it was held by the Supreme Court of Wisconsin in

State vs. Madison Street Railway Co., 40 N. W. 487-490,

the court saying, "the munities and privileges granted the company by the ordinances are as much the franchises of the corporation as if they had been directly granted by the statute under which it was organized."

The right granted by the city to collect rates for water furnished was held to be a franchise in

Spring Valley Water Co. vs. Schottler, 62 Cal. 107-108,

in the opinion in which will be found an extensive discussion of the subject of franchises.

Similar privileges were held to be franchises in

City of Ashland vs Wheeler, 88 Wis. 616.

The right to construct and maintain a bridge is also a franchise.

West River Bridge Co. vs. Dix, 6 How. 541.

Nothing to the contrary was declared in either of the cases cited in the brief of appellants in support of their contention that the defendant mortgaged no franchise. In the Texas case cited,

San Antonio Street Railway Co. vs. State of Texas, 63 Tex. 529,

the right and privilege enjoyed by the company to operate its lines of railway in the streets of the city is repeatedly spoken of as a franchise, thus:

"The franchise in question was granted by the city council and the claim is that it is by virtue of that concession and its acceptance by the company that the duty arose. The company are required to observe all the ordinances of the city then existing, but it is not averred that there was any ordinance in existence at the time of the acceptance of the *franchise* which *imposed* that obligation."

In the case of

State ex rel. Knight vs. Helena Power & Light Co., 22 Mont. 391,

it was held merely that the company was not obliged to operate a line of road which it had constructed. No attempt is made in the opinion to deny that the right and privilege granted was a franchise.

What, then, is the meaning of Section 17? The appellants do not attempt to enlighten the court upon the question. They do not undertake to tell the court to what connition of affairs it was intended the section should have application,—what abuse it was intended to remedy or prevent. They offer no explanation whatever as to what it means or why it

is in the constitution, except such as is implied in the quotation from the opinion in Klosterman vs. Mason to the effect that it is a mere declaration of what the law always had been. The context denies us the power to assume that the constitutional convention was simply making a declaration of what the law was and always had been. It is one of twenty sections comprising Article XV, all practically denying to corporations powers, and restricting the legislature from resting in corporations powers which they might otherwise enjoy by express or implied authority from the legislature. It is provided among other things, for instance, that the right is always reserved to alter or repeal all laws relating to corporations and to alter, revoke or annul any charter—obviously to render inapplicable the law of the Dartmouth College case; that no corporation shall issue stocks or bonds except for labor done, service performed, or money and property actually received—evidently to prevent or minimize the evils of watered stock. This provision means something, and it unquestionably was inserted to meet some existing or anticipated evil or abuse. What that was is not hard to divine. Under the law, as it existed at the time the constitution was adopted, a corporation owing any duties to the public—that is, enjoying franchises—could not, without legislative authority, relieve itself from liabilities incurred in the use or enjoyment of its franchises by conveying away or leasing the property held under them to one who should operate under them.

A distinguished writer thus expresses the rule:

"Sec. 5355. Franchises of Corporations Having Public Duties to Perform Not Alienable.—A numerous class of cases

hold that the franchises of corporations *having public duties to perform*, such as railway companies, canal companies, turnpike companies, gaslight companies and the like, cannot be alienated or seized under judicial process by creditors without the consent of the legislature, because this would disable them from discharging the public duties which they have assumed, and in consideration of which their franchises have been granted to them. The principle is susceptible of the broadest possible statement. It is, that a corporation cannot disable itself, by any species of contract with another corporation or person, without the consent of the legislature, from performing the public duties which it has undertaken, and cannot, by such an agreement, put itself in a position where it will be compelled to make the public accommodation subservient to its private interests. If, therefore, a *railroad company* aliens its railroad, its properties and franchises by *lease*, *mortgage* or in any other way, to another corporation, and substitutes that other corporation in its own place, and devolves upon it the performance of its own public duties, without statutory authority so to do, it will remain liable for the *torts* of the company, committed against third persons while so operating its road."

"Sec. 5536. Under the operation of the foregoing principle, the prevailing doctrine is, that the *secondary franchises* of a railway company—that is to say, the franchise of *constructing* and the franchise of *operating* its railway, are not alienable in any form, whether by sale, lease or mortgage, without the express consent of the legislature."

4 Thompson's Commentaries, 5355, 5356.

It will be observed that such a corporation could not, either by mortgage, lease or any other conveyance, transfer its property so as to relieve it or the property it held under its franchises from torts committed in the use of the franchise—"*without the consent of the legislature*."

Accordingly, corporations of this character procured acts of the legislature to be passed authorizing them to lease,

mortgage or otherwise alien their property. Under acts of this character it was held that the original corporation was not liable for acts committed by its successor, and, of course, the property in the hands of the successor was exempt from any claims against the original owner, not constituting a lien.

Lakin vs. Willamette Valley R. Co., 11 Pac. 68.

Now, having in mind the former state of the law and abuses which had grown up, hereafter referred to, it is not difficult to get at the meaning of this section. Clearly it means that the legislature may authorize corporations holding franchises, as it might before the constitution, to convey property held by them subject to public uses, but that any law permitting them to do so, must be subject to the provision that the property in the hands of the alienee should remain subject to any debts incurred by its predecessor in the operation, use and enjoyment of the property (that is, the property should not be relieved of the liability), and the original owner should remain liable for torts committed by the party into whose charge or possession it placed the property.

It is respectfully submitted that the plain meaning of this section of the constitution is, that if a corporation operating under a public franchise should sell out and transfer its property to another corporation or individual, the property in the hands of the purchaser would still be liable for all obligations incurred by the original owner in the operation, use or enjoyment of the franchise. That the liability of the Helena Power and Light Company to the defendant Warren was incurred in the operation, use and enjoyment of its franchise to run street railways, does not admit of doubt.

If the property of the defendant company had not been

mortgaged, and they should, after the liability was incurred and before judgment was obtained, sell out and transfer all of their property to another corporation, there is no doubt that the property would be liable in the hands of the purchaser to any judgment which Warren might subsequently obtain against the defendant company. That this is the construction of this provision of the constitution so far as it goes there can be no doubt whatever.

The only question that can possibly arise upon the section of the constitution is as to whether a mortgage is included within the term "alienation" as used in it.

In determining this question, as well as the significance of the entire section, we are to consider the abuse which the makers of the constitution were seeking to prevent or to remedy. We are to consider the public policy of the state as evidenced by existing statutes and by the statutes of other states.

In the constitutions of the older states, it is rare that any specific provisions will be found limiting the powers of corporations or of the legislature with reference to corporations, or guarding against abuses which have grown up with respect to corporations. On the contrary, it is a matter of public history that these subjects have engaged a very large share of public attention, and in the newer constitutions will be found extensive provisions concerning these matters.

1 Thompson's Commentaries on Corporations, 538.

Every one of these provisions is the result of public thought and public discussion concerning the particular matter to which they relate.

At the time the constitution of Montana was adopted, a statute was in existence as follows :

"A judgment against any railway corporation for any injury to person or property, or for material furnished, or work or labor done upon any of the property of such corporation, shall be a lien within the county where recovered on the property of such corporation, and such lien shall be prior and superior to the lien of any mortgage or trust deed provided for in this act."

Sec. 707, Comp. Statutes of Montana.

Similar statutes are found in the laws of :

Iowa, Revised Statutes (1888), Sec. 2008 ;

Ohio, 2 Revised Statutes, 1064 (Act of 1861.);

Arkansas, statute approved March 19, 1887;

See also Dow vs. Memphis Ry. Co., 20 Fed., 260;

Central Trust Co. v. R. R. Co., 41 Fed., 551.

The policy of the state, as clearly evinced in this statute, was to make, in the case of railroad companies operating under a public franchise, judgments for work and labor, material furnished and for injuries to personal property by such railway corporations, superior to the lien of any mortgage upon the railroad property, even though such mortgage might have been executed prior to the time that the liabilities were incurred.

These statutes, as are well known, were passed because it was not an infrequent thing at all that claims of this character were entirely shut out by the foreclosure of a mortgage upon the property of the company, sometimes, indeed, as has been said to have been the case in the case of Mass. Loan & Trust Co. vs. Hamilton, for the express purpose of ridding the property of the burden of the judgment. Nearly all of

these corporations operating under public franchises execute mortgages upon their plant to secure bonds. The franchise is enjoyed and the property operated year after year and the company pays its obligations as they accrue. Suddenly an action is begun to foreclose the mortgage, and immediately a receiver is appointed, with the result that those who have given their labor to produce interest which was paid regularly to the mortgagees until default, are defeated of their claims. The injustice of this has become so manifest to courts of equity that it is almost an established rule to refuse in these cases the appointment of a receiver unless the complainant seeking it will agree that out of the funds coming into the hands of the receiver there shall first be paid liabilities incurred in the operation of the property for six months last past, or some other period to be fixed by the court, according to the nature of the particular case.

See the extensive discussion of this subject in

Beach on Receivers, Sec. 387 *et seq.*

In Section 387, above cited, we find the following language:

"Sec. 387. Of the Power of the Court to Give Priority to Claims. That, in a proceeding to foreclose a mortgage and to compel the sale of the mortgaged property for the purpose of paying the debt secured upon it, courts should declare debts of any kind subsequently contracted to be a prior lien, seems, at first sight, to be unreasonable and unjust, and that they should authorize and direct their officer in possession of such property to borrow money and make the loan a lien above all other incumbrances, seems still more unreasonable. Bnt the peculiar nature of railroad property, in that its chief value consists in its continuous operation, and the fact that the general public has a direct and important interest in

the uninterrupted use of the road, together with the long established practice that it is the duty of the court to preserve the property and not to allow it to deteriorate so as to cause a loss to those interested in it, have compelled courts not only—as we have seen—to manage and operate railroad lines, but, in order to do so, to provide the means for securing supplies, labor and other necessities. Though this right has often been questioned, and was formerly strenuously opposed, it may now be considered as definitely settled," citing Wallace vs. Loomis, 97 U. S., 146.

It is not only the expenses paid by the receiver that are paid in preference to the mortgage, but many other expenses which were incurred by the company itself prior to the time that application was made for the appointment of a receiver.

We quote from Section 390 of the foregoing work as follows:

"Sec. 390. Of Preferential Debts for Wages, Labor, Material and Supplies.—The practice of the courts in regard to allowing priority in payment of wages earned and materials furnished before the appointment of a receiver seems to have been founded upon the principle that the interests of bondholders and other creditors require that the line of a railroad shall be kept in uninterrupted operation, and because such debts would have to be paid by the company if no receiver were appointed.

"In a late case in the Supreme Court of the United States, it was held that items for wages due employees of a receiver, within six months immediately preceding his appointment; debts due to other railroad companies and for supplies and damages; debts incurred for the ordinary expenses of the receiver in operating the road, may be allowed priority out of the earnings, and if there is no income fund, after scrutiny and opportunity for those opposing to be heard, then out of the trust property itself. The limit of six months has been fixed in several cases, but there seems to be no good reason why any time should be arbitrarily named."

There is no doubt that it was in view of these conditions and circumstances, and in accordance with the public policy manifested by the statutes referred to, that the provision appealed to was incorporated in the constitution.

The only question that can possibly arise is as to whether the language used will permit the contention that a mortgage is an alienation. It is true that in the strict technical legal sense of the word "alienation," mortgage is not meant, but in the construction of statutes, and particularly of constitutions, the purpose is to be gathered from the general scope of the statute and the evil to be remedied, and the language used is to be construed with reference to such conditions and purposes.

The word "alienation" has frequently been held, in the interpretation of statutes, to include a mortgage. Constitutional provisions are not infrequent to the effect that a homestead shall not be alienated except by the joint act of the husband and wife. These provisions have been uniformly construed to forbid the execution of a mortgage by either alone.

In the case of

Brewster vs. Madden, 15 Kan., 250,

in an opinion by Judge Brewer, it is taken for granted that a mortgage would be an alienation, within the meaning of this constitutional provision, and it was so expressly determined in

Ayers vs. Probasco, 14 Kan., 190.

A similar construction was given to a statute so providing concerning homesteads in

Dunker vs. Chedick, 4 Nev., 378,

and the same significance is given to the language with reference to statutes and constitutions of the same character in

Jelinek vs. Stepan, 41 Minn., 412, and in

Kennedy vs. Stacy, 1 Baxter, 424, and

Sampson vs. Williamson, 55 Am. Dec., 762.

In Vrumage vs. Shaffer, 35 Ind., 341,

the statute provided that if a wife should inherit property from her husband, and should then marry again, she should not be permitted to *alien* such property. It was held that under this statute she was not permitted to mortgage the property, the court saying that a mortgage is in some sense an alienation, and is clearly so within the meaning of the statute under consideration.

The term was also held to include a mortgage within the purview of the statute considered by the court in the case of

Stansburg vs. Company, 4 N. J. Laws, 440,

and in

Behn vs. Phillips, 18 Ga , 466.

See also Wapples on Homestead and Exemptions, 375-376;

Thompson on Homesteads and Exemptions, 466.

Even in cases of insurance, although the mortgage is not held to be an alienation so as to produce a forfeiture ordinarily of the mortgage under a clause forbidding alienation of the property, yet when the mortgage is foreclosed and a sale made by the Master in Chancery, the alienation is held to be complete and the policy becomes void.

May on Insurance, Secs. 264-269.

From these sections we quote as follows:

In the former section, speaking of what constitutes an

alienation, the author says, "and so, perhaps, is a sale by a master in chancery of a mortgagor's interest under a decree by foreclosure, with part payment of the purchase money and execution by the vendee of the articles of sale."

From Section 269 we quote as follows:

"When, however, the title becomes absolute in the mortgagee or his assigns, by foreclosure, or, as is tantamount to a foreclosure, merges in the purchaser of the equity, who subsequently takes an assignment of the mortgage, the transfer is complete and the *change of title is an alienation*."

Professor Thompson also speaks in the sections above quoted of *aliening* by mortgage.

If the constitution had read, "The legislative assembly shall not pass any law permitting the leasing or alienation, *by mortgage or in any other way*, of any franchise so as to release or relieve the franchise or property held thereunder from any of the liabilities of the lessor or grantor, or lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise, or any of its privileges," it could not be fairly disputed that the property would remain subject to the appellant's judgment. A careful consideration of the section impels the belief that it means the same as though it had been so expressed.

It is to be borne in mind also that the cases in which corporations of this character had made absolute and instant sales of their property, and thus defeated the just claims of creditors, were very few, while the instances in which liabilities incurred in the operation of the property under the franchise, by a foreclosure sale, had so operated, were so frequent that courts of equity developed a means of at least mitigating it.

Illinois Trust vs. Doud, 105 Fed., 123-150.

Legislatures had passed acts to still further correct it. It is not to be considered that the legislature intended to make the property liable in the hands of one holding by a direct and absolute transfer, and leave it free when it came to him by process of foreclosure. There was little occasion to provide for the former contingency,—there was abundant to suggest provision as to the latter.

The appellants, without expressly admitting it, apparently concede that if an absolute transfer were made, the property would still remain liable for the debts of the transferror. They say that "it relates at most to liabilities which had their existstence which were contracted or incurred at and prior to the time of the transfer."It must be remembered that under the authorities heretofore cited, unless the legislature either expressly or impliedly provided otherwise, the original owner and the property remained liable for torts committed after the transfer, for liabilities thereafter incurred as well as those theretofore incurred. This section was plainly intended to deny to the legislature the right to pass a law which would release this obligation. But it is perfectly evident that the section refers to future obligations as well as past ones. The legislature is denied the right to relieve either the corporation or the property from obligations incurred in the use of the franchise. As to past obligations—those occurring before the transfer, it was already beyond the power of the legislature to relieve the corporation. If it contracted any debt or injured anyone in person or property, it was already beyond the power of the legislature either by general anticipatory legislation or by spe-

cial relief act to release it from the obligation to pay. Such a law would deprive a man of property without due process of law.

It is beyond the power of the legislature to release a party obligated and throw the burden on someone else. So the framers of the constitution must have intended future obligations to be incurred by the transferree as well as past charges. It is said that to give the section this construction it is necessary to interpolate the words, "or which may thereafter be incurred." As well may we charge that in order to give it the construction contended for by appellants the court must insert the words, "which may have theretofore been." There is an elipsis, anyway, and the plain meaning is brought out by considering that it reads as though the words "thereafter or theretofore" were inserted before "contracted."

This argument is based, further, upon the assumption that by the mortgage the property was transferred to the mortgagees in 1895. A mortgage is not a transfer under the laws of Montana, but a lien.

Under the authorities cited above the alienation by the mortgage becomes complete when the sale is made by the master. The decree, if modified as appellants desire it should be, would provide that the property should be conveyed by the master's sale so as to relieve it in case the avails of the sale are not sufficient to satisfy the complainant's claim, from the burden of appellee's judgment rendered against the Helena Power and Light Company on account of a liability incurred by it in the use and enjoyment of its franchises.

It was remarked above that the appellants do not venture

any opinion as to what this section does mean or what its application is, but they cite some cases to show that it does not mean what appellee claims it does. Reference is made to the case of Antietam Paper Co. vs. Chronicle, 115 N. C., 143, arising on a statute giving a priority over railroad mortgages, claims for labor and material, and for injuries to person and property. It was held that paper, ink, gas, etc., were not "materials" within the language of the statute. The applicability of this case is not very obvious. Another case is cited from the same state holding that some other goods furnished were not "materials" under the statute, and still another holding that cotton and flour were not, either.

Reference is then made to the case of Klosterman vs. Mason, in which it is said that the section is "but a declaration of what the courts have generally held to be the law." As shown above it never has been the law and no court ever held it was the law that the legislature could not pass a law permitting a corporation to alien its property so as to relieve it from further liability. It has been expressly and repeatedly held that the legislature has that power in the absence of constitutional restriction. The expression is inaccurate. But when the case is examined it is found that nothing was decided that is of assistance in this inquiry. The company, transferring in that case, owned a railroad, but it did not appear that it had any franchise except its right to be a railroad corporation, and that it could not possibly transfer except by virtue of a most unusual statute. It "was not designed or intended as a road for general traffic, but simply as a means of transportation of logs to the company's mill." It was a part

of the property appurtenant to a milling business. It was conveyed with other property in satisfaction of an indebtedness of the company. Klosterman obtained a judgment against the company for $300, but it did not appear that it was on a liability incurred in operating the railroad. He really attacked the conveyance as fraudulent. The facts, which would invoke the proper protection of the constitution, were not in the case at all.

In the case of

Wyeth vs. James Spencer, 47 Pac., 604,

it appeared that a corporation, apparently enjoying no franchises except its existence, made a general assignment for the benefit of creditors. The court said that this conveyance was made for the express purpose of paying its obligations and was clearly forbidden by the constitution.

The case of

Ames & Frost Co. vs. Heslet, 19 Mont., 188,

said to have decided the same way, does not even refer to the constitutional provision under consideration.

The appellants finally contend that the construction of this provision of the constitution claimed for it by appellee, would deprive the complainant of property without due process of law. Inasmuch as the Helena Power and Light Company was incorporated and executed this mortgage long after the constitution was adopted, the contention is without force.

Central Trust Co. vs. Boukright, 65 Fed., 257-259

If by this agreement it is meant to assert that the complainant had a right to be heard upon the facts upon which

appellee's judgment was founded, it is sufficient to answer that the facts were set up in the answer, and the complainant did not see fit to take issue on them, but moved for judgment, notwithstanding—in fact, took his decree upon the bill and answer, the latter being taken as confessed.

It is respectfully submitted that the plain purpose of this statute was to meet exactly such a case as is now presented, and that it was intended by it to leave the property in the hands of the purchaser under any foreclosure sale of this mortgage sought to be foreclosed, still subject to the liabilities incurred by the Helena Power and Light Company in the operation, use and enjoyment of the franchises mortgaged.

Respectfully Submitted.

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